No. 20724

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

KENNETH G. WALKER and NANCY M. WALKER,
Appellants,

vs.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
Appellee.

APPELLANTS' CLOSING BRIEF.

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PREFACE.

Appellee in their complaint [Clk. Tr. p. 2; p. 4, lines 9-29] claimed jurisdiction in the United States District Court on five (5) separate grounds. In Appellee's Brief the Federal Savings and Loan Insurance Corporation has abandoned all but one of the claimed grounds for jurisdiction and now relies solely upon an improper interpretation of 28 U.S.C. 1345. (App. Br. p. 2.)

It is interesting to note that in the last eighteen (18) years, since the enactment of 28 U.S.C. 1345 in 1948, no judicial or legislative utterance can be found which labels or designates Appellee as an "agency" of the United States; in fact, no such utterance can be found since the creation of Appellee thirty-two (32) years ago.

Not until the within cause has Appellee claimed United States District Court jurisdiction under the pro-

visions of 28 U.S.C. 1345; such claim is erroneous and the District Court has no jurisdiction as to the within proceedings.

I.

No Federal Question.

It is conceded by Appellee that no federal question is involved in this cause. If a federal issue were involved, jurisdiction in the District Court would be conceded under the provisions of 28 U.S.C. 1331, which provides, in part, as follows:

> "(a) The District Courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of Ten Thousand ($10,000) Dollars, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States. . . ."

II.

Statutes Relating to Jurisdiction in the District Court Are Not to Be Liberally Construed.

Appellee urges this court to liberally construe 28 U.S.C. 1345 and 28 U.S.C. 451 in determining the issue of jurisdiction. (App. Br. p. 8.) In urging such contention, Appellee invites the court to error. A strict construction, not a broad or liberal construction, is required. Statutes relating to the jurisdiction of the United States Courts are to be strictly construed.

> ". . . It is well settled that statutes relating to the jurisdiction of the United States are to be strictly construed."
>
> *Federal Savings & Loan Insurance Corporation v. Third National Bank in Nashville*, 60 F. Supp. 110;

Elgin v. Marshall, 106 U.S. 578, 1 S. Ct. 484, 27 L. Ed. 249;

Grace v. American Central Insurance Co., 109 U.S. 278, 3 S. Ct. 207, 27 L. Ed. 932;

Healy v. Ratta, 292 U.S. 263, 54 S. Ct. 700, 78 L. Ed. 1248.

Appellee urges, without authority, that it is "the manifest intent of Congress to open wide the Federal Courts to civil suits brought by any arm of the United States." (App. Br. p. 8.)

> "It must be kept in mind that, . . . the policy of the Supreme Court of the United States is to look with disfavor upon attempted restrictions on the legislative authority and policy of a state." (*Sacramento Municipal U. District v. Pacific Gas & Elec. Co.* (1942), 20 Cal. 2d 684, 128 P. 2d 529; citing *Palmer v. Com. of Massachusetts*, 308 U.S. 79, 60 S. Ct. 34, 84 L. Ed. 93; *Railroad Comm. v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971.)

III.

The Fact That Appellee Has Succession Until Dissolved by Act of Congress Is Immaterial.

The fact that Appellee corporation continues to exist until dissolved by act of Congress is of no import. (App. Br. p. 4.)

Every corporation, whether created under state or federal law, continues to exist only until such time as the sovereign state or federal government decrees otherwise.

> "The legislature shall have power, by general laws and not otherwise, to provide for the formation, organization and regulation of corporations and to

prescribe their powers, rights, duties and liabilities and the powers, rights, duties and liabilities of their officers and stockholders or members. All laws now in force in this state concerning corporations and all laws that may be hereafter passed pursuant to this section may be altered from time to time *or repealed.*" (*Constitution of the State of California, Article XII, Section 1.*) (Emphasis added.)

The reserved power of the states grants them authority to repeal the charter of corporations. (*In re College Hill Land Association of the City of San Diego*, 108 Pac. 681, 157 Cal. 596.)

Likewise, Congress has no less authority over any corporation it has created. It is elemental that Congress cannot bind itself or subsequent sessions of Congress. The retention of such power to repeal is not evidence or even a remote indication that Appellee is an agency of the United States as defined in 28 U.S.C. 451.

In short, what a sovereign has created, it can dissolve; no legislative act, whether creating or allowing corporations, or otherwise, can bind subsequent acts of the legislature.

The fact that the act creating Appellee (12 U.S.C. 1725) provides that the corporation shall have succession until dissolved by act of Congress, as so heavily relied upon by Appellee (App. Br. p. 4), is not of any import in determining whether or not Appellee is an "agency" within the purview of 28 U.S.C. 1345 and 28 U.S.C. 451.

In Paragraph IV, *infra*, over forty-five (45) corporations created by Act of Congress are listed; every one

of them have succession until dissolved by act of Congress, and not one is an "agency" of the United States under 28 U.S.C. 451 and 1345. (See Title 36, U.S.C.)

IV.

Limited Tax Exemptions, Required Financial Reports, and Governmental Functions.

The fact that Appellee has limited tax exemptions, must make financial reports and performs a government function is immaterial to the determination of the definition of "agency" as used in 28 U.S.C. 451 and 28 U.S.C. 1345.

Many corporations created by Act of Congress have been given certain tax exemptions, perform a government or patriotic function, and are required to make financial reports to Congress; yet, not one is an "agency" of the United States.

The Agricultural Hall of Fame, American Chemical Society, American Historical Association, The American Legion, The American National Theater and Academy, American Society of International Law, American Symphony Orchestra League, American War Mothers, AMVETS (American Veterans of World War II), Belleau Wood Memorial Association, Big Brothers of America, Blinded Veterans Association, Blue Star Mothers of America, Board for Fundamental Education, Boy Scouts of America, Boys' Clubs of America, Civil Air Patrol, Conference of State Societies, Washington, District of Columbia, The Congressional Medal of Honor Society of the United States of America, Daughters of the American Revolution, Disabled American Veterans, The Foundation of the Federal Bar Association, Future Farmers of America, Girl Scouts of America, Grand Army of the Republic,

Jewish War Veterans, U.S.A., National Memorial, Inc., Ladies of the Grand Army of the Republic, Legion of Valor of the United States of America, Incorporated, Marine Corps League, Military Chaplains Association of the United States of America, Military Order of the Purple Heart of the United States of America, National Academy of Sciences, National Conference on Citizenship, National Fund for Medical Education, National Music Council, National Woman's Relief Corps, Auxiliary to the Grand Army of the Republic, The National Yeomen F, Naval Sea Cadet Corps, Navy Club of the United States of America, Reserve Officers Association, Sons of the American Revolution, Sons of Union Veterans of the Civil War, United Spanish War Veterans, United States Blind Veterans of World War I, United States Olympic Association, Veterans of Foreign Wars of the United States, Veterans of World War I of the United States of America, **are all corporations created under and by an Act of Congress; all have been given certain tax exemptions by Act of Congress; all must make financial reports to Congress; all perform a government or patriotic function or aid in a government function and not one can be said to be an "agency" of the United States under 28 U.S.C. 451 or 28 U.S.C. 1345. (See 36 U.S.C. 1101, 1102, and 1103.)**

> "For example, the American Red Cross, the United Service Organizations, the National Banks, and several other institutions are *'instrumentalities'* of the government. . . . No one has ever contended that they hold a position 'under the United States Government' under the Act." (*Gradell v. United States*, cited *supra*, at p. 964) (emphasis added).

The word "instrumentality" is absent from the provisions of 28 U.S.C. 1345 and 28 U.S.C. 451 and its absence has a specific meaning and effect. Appellee desires this Court to "insert" the word "instrumentality" into 28 U.S.C. 451 and 28 U.S.C. 1345, an act that can only be done, and has not been done, by Congress.

The fact that an "instrumentality" may perform a government function does not make it an "agency" under 28 U.S.C. 1345.

"Instrumentalities" may be "Federal Agencies" within the broad definition of "Federal Agency" under the Tort Claims Act, and other Acts of Congress, but this does not make an "instrumentality" an "agency" under the definition of "agency" for jurisdictional purposes as contained in 28 U.S.C. 451 and 28 U.S.C. 1345.

The American Red Cross, American Legion, and the United Service Organizations, (and the numerous corporations listed in Paragraph IV, *infra*) have been held to perform governmental functions (*i.e.,* an "arm of the United States"); though they perform governmental functions and are corporations created by an Act of Congress, and though they are instrumentalities, they are *not agencies* of the United States and have no access to the United States District Court under 28 U.S.C. 1345.

The Courts and Congress have consistently made a distinction between an *"instrumentality"* of the United States and an *"agency"* of the United States. Thus, the Army Exchange Service and the Air Force Exchange Service have been held to be "instrumentalities."

> "Although the Exchange is an 'instrumentality' of the United States, it has no power to bind the United States by contract, and the government is

not liable under contracts of the Exchange with third parties. *Pulaski Cab Co. v. The United States,* 157 F. Supp. 955, 141 Ct. Cl. 160."

(*Gradall v. United States,* 329 F. 2d 960 (1963), at page 964.)

"It could hardly be thought that the United States is responsible for liabilities of the United Service Organizations or the Red Cross, *however essential may be their contribution to the performance of governmental functions. Because the operation of post exchanges is 'deemed essential' for governmental operation,* it does not follow that the government is any more liable for their contracts than they would be for a privately staffed agency that performed under contract the same functions." (Emphasis added.)

(*Pulaski Cab Co. v. United States,* 157 F. Supp. 958, 141 Ct. Cl. 165.)

V.

Use of the Mail.

Appellee does not have free use of the mails and must pay for such use. The fact that payment is made directly to the Post Office Department in lieu of buying "stamps" does not create an inference that Appellee corporation is an "agency" for jurisdictional purposes as defined in 28 U.S.C. 451, (39 U.S.C. 4156).

VI.

12 U.S.C. 1437b.

Appellee apparently concedes that prior to the enactment of 12 U.S.C. 1437(b) in 1955 that it was not an "agency" of the United States within the purview of 28 U.S.C. 1345.

In referring to 12 U.S.C. 1437(b) Appellee state at page 11 of Appellee's Brief as follows:

> "The fact remains however, that under the first sentence of this section, Congress has made the Insurance Corporation an independent agency in the executive branch of the government; wherefor, the corporation falls within the ambit of 28 U.S.C. 451, and thus is entitled to the benefit of 28 U.S.C 1345." (App. Br. p. 11.)

Appellee concedes that the enactment of 12 U.S.C. 1437(b), on August 11, 1955, did not constitute a grant of jurisdiction to sue in the Federal Court. (App. Br. p. 11.) However, Appellee takes the position that under the first sentence of 12 U.S.C. 1437(b) Congress made it an agency within the purview of 28 U.S.C. 451 (defining "agency" as used in 28 U.S.C. 1345); what Appellee was prior to August 11, 1955, is not revealed.

A reading of 12 U.S.C. 1437(b) reflects that it was not the intention of Congress to extend or grant jurisdiction by virtue of its enactment; specifically the section states that Appellee corporation shall have no greater rights than it had prior to August 11, 1955, or prior to June 24, 1954.

12 U.S.C. 1437(b) does not constitute Appellee an agency of the United States under 28 U.S.C. 451 and 28 U.S.C. 1345, and relates only to the internal functions of the Federal Home Loan Bank Board.

VII.

31 U.S.C. 841 and 846.

Appellee feels that referral to it as a "wholly owned government corporation" in 31 U.S.C. 846 makes it an agency of the United States under 28 U.S.C. 1345 and 28 U.S.C. 451. (App. Br. p. 14.)

This issue is discussed at pages 7, 8 and 9 of Appellant's Opening Brief. To emphasize, the purpose of 31 U.S.C. 841 and 846 is to bring government corporations and their transactions and operations under annual scrutiny by the Congress. The use of the phrase "wholly owned government corporation" is expressly limited to Title 31, U.S.C. 846. 31 U.S.C. 846 in defining the term limits it to "As used in this chapter. . . ." It was called to the attention of the Court that in the listing of various corporations under 31 U.S.C. 846 that the Federal National Mortgage Association is included as a "wholly owned government corporation" whereas it obviously is not as over one million shares of its common stock is publicly traded and owned by private individuals. The issue raised by Appellee relating to 31 U.S.C. 841 and 846 is more fully discussed in Appellant's Opening Brief, Paragraph VI and will not be here repeated.

VIII.

Appellee Has No Sovereign Character.

Black's Law Dictionary, Third Edition, defines "sovereign" and "sovereignty" as follows:

> "SOVEREIGN: A person, body, or state in which independent and supreme authority is vested . . .".
>
> "SOVEREIGNTY: The supreme, absolute, and uncontrollable power by which any independent state is governed; . . .".

Appellee does not even remotely partake or have any of the characteristics of a sovereign entity.

IX.

The Federal Deposit Insurance Corporation.

A comparison between Appellee herein and the Federal Deposit Insurance Corporation is made in Paragraph VII, pages 15, 16 and 17 of Appellant's Opening Brief and will not be here repeated. However, it is to be noted that the statute creating the Federal Deposit Insurance Corporation, 12 U.S.C. 1819, specifically provides that any suit of a civil nature involving the Federal Deposit Insurance Corporation shall be "deemed to arise under the laws of the United States" and Federal District Court jurisdiction is automatically provided for in the act itself under the provisions of 28 U.S.C. 1331, allowing original jurisdiction in the District Courts in matters arising under the Constitution, laws or treaties of the United States.

X.

Repurchase of Shares of Stock.

Appellees take the position that a corporation which issues shares of stock and then repurchases it is logically the same as a corporation which has never issued stock.

> Share repurchases "always reduce the net assets. . . ." (*Ballantine on Corporations*, Revised Edition, p. 605.)

It should be remembered that prior to the completion of the purchase of its own shares of stock by Appellee from the United States Treasury, completed in 1958, that at least from the time that the stock was transferred to the United States Treasury to the time it was fully purchased the Appellee was solely owned by the United States and the prohibition of 28 U.S.C. 1349, requiring more than 50 percent ownership by the United

States, would not have applied. However, when such stock was fully purchased from the treasury the United States no longer had any ownership interest therein and Appellee corporation was subject to the prohibitions of 28 U.S.C. 1349.

XI.

Agency, Government Agency, Federal Agency, Instrumentality.

Congress has been most explicit and definite in its use of the word "agency" and in almost every Title and Chapter (if not all) where the word "agency" is used, Congress has expressly defined such word specifically setting forth its meaning as used in the specific Chapter or Title.

Examples of the express act and intent of Congress to define the word "agency" with particularity as the word is used in each Title and Chapter will be set forth.

Pertaining to powers of the Executive Department:

> "*When used in sections 133z-133z-15 of this title,* the term 'agency' means any executive department, commission, counsel, independent establishment, government corporation, board, bureau, division, service, office, officer, authority, administration, or other establishment, in the executive branch of the government and means also any and all parts of the municipal government of the District of Columbia except the Courts thereof. Such term does not include the Controller General of the United States or the General Accounting Office, which are a part of the legislative branch of government." (Emphasis added.)
>
> (5 U.S.C. 133z-5.)

Pertaining to Administrative Procedure:

"As used in this chapter —

(a) 'Agency' means each authority (whether or not within or subject to review by another agency) of the government of the United States other than Congress, the Courts, or the governments of the possessions, territories, or the District of Columbia. Nothing in this chapter shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 1002 of this title, there shall be excluded from the operation of this chapter (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) court marshal and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by sections 301-303, . . .".

(5 U.S.C. 1001.)

Pertaining to Review of Orders:

"As used in the chapter— . . .

(d) When the order sought to be reviewed was entered by the Federal Communications Commission, 'agency' means the commission; when such order was entered by the Secretary of Agriculture, 'agency' means the Secretary; when such order was entered by the United States Maritime Commission, or the Federal Maritime Board, or the Maritime Administration, 'agency' means that commis-

sion or board, or administration, as the case may require; when such order was entered by the Atomic Energy Commission, 'agency' means that commission."

(5 U.S.C. 1032.)

Pertaining to general criminal provisions:

"As used in this title: . . .

The term 'agency' includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense."

(18 U.S.C. 6.)

Pertaining to arms control a distinction is made, as is often made by Congress, between "Government Agency" and "Agency":

"As used in this chapter—(b) the term 'government agency' means any executive department, commission, agency, independent establishment, *corporation wholly or partly owned by the United States which is an instrumentality of the United States,* or any board, bureau, division, service, office, officer, authority, administration, or other establishment in the executive branch of the government.

(c) The term 'agency' means the United States Arms Control and Disarmament Agency." (22 U.S.C. 2552) (emphasis added).

Pertaining to appropriations:

". . . When used in this section, the term 'agency' means any executive department, agency, commission, authority, administration, board, or other independent establishment in the executive branch of the government, *including any corporation wholly or partly owned by the United States which is an instrumentality of the United States.* . . . The provision of this section shall not apply to any corporation which obtains funds for making loans, other than paid in capital funds, without legal liability on the part of United States." (emphasis added). (31 U.S.C. 665).

Pertaining to public buildings and works:

"As used in sections 304(g)-304(m) of this title —. . . (2) 'agency' includes any executive department, independent establishment, board, commission, bureau, service, or division of the United States, and *any corporation in which the United States owns all or a majority of the stock.*" (Emphasis added). (40 U.S.C. 304(f)).

Pertaining to public printing:

". . . The terms 'federal agency' or 'agency' mean the President of the United States, or any executive department, independent board, establishment, bureau, agency, institution, commission, or separate office of the administrative branch of the government of the United States but not the legislative or judicial branches of the government; . . ." (44 U.S.C. 304).

Pertaining to national security:

"When used in sections 403(b)-403(j) of this title, the term—(a) 'agency' means the Central Intelligence Agency, . . ." (50 U.S.C. 403(a)).

Pertaining to war and defense contracts:

". . . The term 'agency of the government' means any part of the executive branch of the government or any independent establishment of the government or part thereof, including any department (whether or not a department as defined in subsection (a) of this section), *any corporation wholly or partly owned by the United States which is an instrumentality of the United States,* or any board, bureau, division, service, office, officer, employee, authority, administration, or other establishment of the government which is not a part of the legislative or judicial branches." (emphasis added). (50 App. U.S.C. 1213(1)).

Pertaining to quarters and facilities for government personnel:

"For the purpose of this chapter— . . .

(2) 'Agency' means—

(A) Each executive department of the government;

(B) Each agency or independent establishment in the executive branch of the government;

(C) Each corporation owned or controlled by the Government, except the Tennessee Valley Authority; and,

(D) The General Accounting Office. . . ."

(5 U.S.C. 3121).

Pertaining to the trade expansion program:

"For the purpose of this chapter—

(1) The term 'agency' includes any agency, department, board, wholly or partly owned corporation, *instrumentality*, commission, or establishment of the United States." (Emphasis added.) (19 U.S.C. 1806).

Pertaining to money and finance and settlement of certain claims:

"As used in Sections 240-242 of this title—

(1) 'Agency' includes an executive department, independent establishment, or corporation primarily acting as an *instrumentality* of the United States, but does not include any contractor with the United States. . . ." (Emphasis added). (31 U.S.C. 240).

Pertaining to navigation and navigable waters:

"(a) When used in this section—

(1) The term 'Agency' means the corps of engineers, United States Army, or the Bureau of Reclamation, United States Department of the Interior, whichever has jurisdiction over the project concerned. . . ." (33 U.S.C. 701(r).

Pertaining to legislation on bridges on federal dams:

"(a) Each executive department, independent establishment, office, board, bureau, commission, authority, administration, corporation wholly owned or controlled by the United States, or other agency of the Government of the United States, hereinafter collectively and individually referred to as 'agency'. . . ." (23 U.S.C. 320).

Pertaining to atomic energy:

"The intent of Congress in the definitions as given in this Section should be construed in the words or phrases used in the definitions. As used in this chapter:

(a) The term 'agency of the United States' means the executive branch of the United States, or any Government agency, or the legislative branch of the United States, or any agency, committee, commission, office, or other establishment in the legislative branch, or the judicial branch of the United States, or any office, agency, committee, commission, or other establishment in the judicial branch. . . ." (42 U.S.C. 2014).

In defining *"Government agency"* with relation to the executive department:

"As used in Sections 3031-3038 of this title, and Section 522 of Title V, the term— . . .

(2) 'Government Agency' means

(a) Each Executive Department of the Government,

(b) Each independent establishment or agency in the executive branch of the Government, including each corporation wholly owned (either directly or through one or more corporations) by the Government,

(c) The general accounting office, and

(d) The liberary of Congress; . . ."

(5 U.S.C. 3032).

In dealing with foregin relations:

"When used in Sections 280-280c of this Title— . . . (2) The term 'Government Agency' means

any department, independent establishment, or other agency of the Government of the United States, or any corporation wholly owned by the Government of the United States; . . ." (22 U.S.C. 280a).

With relation to the Foreign Service:

"When used in this chapter the term— . . . (4) 'Government Agency' means any executive department, board, bureau, commission, or other agency in the executive branch of the Federal Government, or any corporation wholly owned (either directly or through one or more corporations) by the United States; . . ." (22 U.S.C. 802).

Again, in dealing with foreign relations and the Information Service:

"When used in this chapter, the term— . . . (3) 'Government Agency' means any executive department, board, bureau, commission, or other agency of the Federal Government, or independent establishment, or any corporation wholly owned (either directly or through one or more corporations) by the United States." (22 U.S.C. 1433).

In dealing with Arms Control and Disarmament:

"As used in this chapter— . . . (b) the term 'Government Agency' means any executive department, commission, agency, independent establishment, *corporation wholly or partly owned by the United States which is an instrumentality of the United States,* or any board, bureau, division, service, office, officer, authority, administration, or other establishment in the executive branch of the Government." (Emphasis added). (22 U.S.C. 2552).

In dealing with reimbursements to the Treasury:

"(c) As used in this Section—

(1) The term 'Government Agency' shall include any department, office, agency, or establishment of the Government other than the department of the Treasury, and any wholly owned or mixed ownership Government corporation; . . ." (31 U.S.C. 157).

In dealing with public buildings and property:

"When used in this chapter— . . .

(b) 'Government Agency' and 'Government agencies' mean the Government of the United States, District of Columbia, Commonwealth of Virginia, State of Maryland, or any political subdivision, agency or *instrumentality* thereof, which is located within, or whose jurisdiction includes all or part of, the National Capitol Region; the term includes, but is not limited to, public authorities, towns, villages, cities, other municipalities, and counties." (Emphasis added). (40 U.S.C. 652).

In dealing with war contracts:

"As used in this chapter— . . .

(f) The term 'Government Agency' means any executive department of the Government, or any administrative unit or subdivision thereof, any independent agency or any corporation owned or controlled by the United States in the executive branch of the Government, and includes any contracting agency. . . ." (41 U.S.C. 103).

In dealing with atomic energy:

"The intent of Congress in the definitions as given in this Section should be construed from the words or phrases used in the definitions. As used in this Chapter:

(k) The term 'Government agency' means any executive department, commission, independent establishment, corporation, wholly or partly owned by the United States of America, *which is an instrumentality of the United States,* or any board, bureau, division, service, office, officer, authority, administration, or other establishment in the executive branch of the Government." (Emphasis added.) (42 U.S.C. 2014).

In dealing with war and national defense:

"When used in Section 403b-403j of this title, the term— . . .

(c) 'Government Agency' means any executive department, commission, counsel, independent establishment, corporation wholly or partly owned by the United States, which is an *instrumentality* of the United States, board, bureau, division, service, officer, authority, administration, or other establishment, in the executive branch of the Government." (Emphasis added). (50 U.S.C. 403a).

In dealing with the universal military training:

"(g)(1) As used in this section—. . . .

(B) The term 'Government Agency' means any department, agency, independent establishment, or corporation in the executive branch of the United States Government. . . ." (50 App. U.S.C. 468).

With relation to the definition of *"federal agency or instrumentality":*

In dealing with the executive departments:

"(f) For the purposes of this section— . . . (2) The term 'Federal Agency' includes any executive department, independent establishment, or other agency of the United States (except a member

bank of the Federal Reserve System)." (5 U.S.C. 118k).

Again, in dealing with executive departments:

"As used in Sections 139-139f of this title—. . . .

(a) The term 'federal agency' means any executive department, commission, independent establishment, corporation owned or controlled by the United States, board, bureau, division, service, office, authority or administration, in the executive branch of the Government; but such terms shall not include the general accounting office nor the Governments of the District of Columbia and of the territories and possessions of the United States, and the various subdivisions of such Governments. . . ." (5 U.S.C. 139e).

Again, with relation to the executive department:

"As used in this chapter—. . . .

(2) 'Federal Agency' means any department or agency in the executive branch of the United States Government including independent establishments and Government owned or controlled corporations, and any employing authority in the legislative branch of the United States Government." (5 U.S.C. 2331).

Again, as used in the executive department:

". . . Section 1. As used in this order:

. . . (b) The term 'Federal Agency' means any executive department of the Government of the United States of America, any agency or independan establishment in the executive branch of the Government, and any corporation wholly owned or controlled by the Government. . . ." (*Executive*

Order No. 10982, January 2, 1962, 27 F.R. 3, 5 U.S.C. 3076).

In dealing with narcotics:

"(b) As used in this section, the term 'federal agencies' shall include: (1) The executive departments; (2) The departments of the Army, Navy and the Air Force; (3) The independent establishments and agencies in the executive branch, including corporations wholly owned by the United States, and (4) The municipal Government of the District of Columbia. . . ." (21 U.S.C. 198.)

In dealing with tort claims procedure:

"As used in this chapter and Sections 1346(b) and 2401(b) of this Title, the term — 'Federal Agency' includes the executive departments and independent establishments of the United States, and corporations primarily acting as, *instrumentalities* or agencies of the United States, but does not include any contractor with the United States." (Emphasis added.)

(28 U.S.C. 2671.)

It is noted that the definition of "*Federal Agency*" under tort claims procedure is much broader than the definition of "agency" in 28 U.S.C. 451. The Tort Claims Procedure Act specifically uses the word "instrumentality" and makes a distinction between an "instrumentality" and an "agency" of the United States. The definition specifically covers corporations acting as instrumentalities of the United States as well as corporations acting as agencies of the United States and recognizes the distinction between the two by separately defining them. (28 U.S.C. 2671.)

In dealing with public buildings, property and works:

"The term 'federal agency' is used in Sections 304a-304c of this title, means any executive department, independent establishment, commission, board, bureau, division, or office in the executive branch, or other agency of the United States, including corporations wholly owned by the United States."

(40 U.S.C. 304e.)

With relation to general provisions pertaining to government property:

"As used in this chapter, Chapter 11 of Title 5, Chapter 4 of Title 41, and Chapter 11 of Title 44—

(a) The term 'executive agency' means any executive department or independent establishment in the executive branch of the Government, including any wholly owned Government corporation.

(b) The term 'federal agency' means any executive agency or any establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his direction). . . ."

(40 U.S.C. 472.)

Again, in dealing with public buildings and property:

"As used in this chapter — . . .

(3) The term 'federal agency' means any executive agency or any establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his direction)

(4) The term 'executive agency' means any executive department or independent establishment in the Executive Branch of the Government including any wholly owned Government corporation and including (a) the Central Bank for Cooperatives and the Regional Banks for Cooperatives, (b) Federal Land Banks, (c) Federal Intermediate Credit Banks, (d) Federal Home Loan Banks, (e) Federal Deposit Insurance Corporation, and (f) the Federal National Mortgage Association. . . ."

(40 U.S.C. 612.)

In dealing with public health and welfare and defense housing:

"As used in subchapters II-VII of this Chapter, . . . (b) The term 'federal agency' means any executive department or office (including the President), independent establishment, commission, board, bureau, division, or office in the executive branch of the United States Government, or other agency of the United States, including corporations in which the United States owns all or a majority of the stock, directly or indirectly."

(42 U.S.C. 1522.)

Again, in dealing with public health and welfare and defense housing:

"As used in this subchapter, the following terms shall have the meanings respectively ascribed to them below, and, unless the context clearly indicates otherwise, shall include the plural as well as the singular number: . . .

(b) 'Federal Agency' shall mean any executive department or officer (including the President), in-

dependent establishment, commission, board, bureau, division, or office in the executive branch of the United States Government, or other agency of the United States, including corporations, in which the United States owns all or a majority of the stock, directly or indirectly. . . ."

(42 U.S.C. 1592(n).)

In dealing with damages by flood:

"As used in this chapter, the following terms shall be construed as follows unless a contrary intent appears from the context: . . .

(f) 'Federal Agency' means any department, independent establishment, Government corporation, or other agency of the executive branch of the federal government, excepting, however, the American National Red Cross."

(42 U.S.C. 855a.)

In dealing with atomic energy:

"The intent of Congress in the definitions as given in this section should be construed from the words or phrases used in the definitions.

As used in this chapter:

(a) The term 'Agency of the United States' means the executive branch of the United States, or any Government agency, or the legislative branch of the United States, or any agency, committee, commission, office or other establishment in the legislative branch, or the judicial branch of the United States, or any office, agency, committee, commission or other establishment in the judicial branch.

. . .

(k) The term 'Government Agency' means any executive department, commission, independent establishment, corporation, wholly or partially owned by the United States of America, *which is an instrumentality of the United States,* or any board, bureau, division, service, officer, office, authority, administration, or other establishment in the executive branch of the Government. . . ." (Emphasis added.)

(42 U.S.C. 2014.)

It is noted that in the quoted definitions that the word "instrumentality" **(absent from 28 U.S.C. 451 and 28 U.S.C. 1345)** does appears in 42 U.S.C. 2014, 28 U.S.C. 2671, 50 U.S.C. 403a, 40 U.S.C. 652, 31 U.S.C. 240, 19 U.S.C. 1806, 50 App. U.S.C. 1213-(1), 31 U.S.C. 665, and 22 U.S.C. 2552.

It is also to be noted that 42 U.S.C. 2014, 28 U.S.C. 2671, 50 U.S.C. 403a, 22 U.S.C. 2552, 19 U.S.C. 1806, 50 App. U.S.C. 1213(1), 31 U.S.C. 665, and 22 U.S.C. 2552, make a distinction between the meaning of the words "agency", "instrumentality," "independent establishment" and "corporations wholly or partially owned by the United States."

There is a distinction with a difference in the meaning of the words used by Congress. The fact that an "instrumentality" such as Appellee (specifically designated such in 12 U.S.C. 1725) is not designated or included in 28 U.S.C. 451 or 28 U.S.C. 1345 means just what it says. In the absence of a federal question, Appellee cannot justifiably claim jurisdiction in the United States District Court.

If more clarification is needed as to a Congressionally recognized distinction between the words, it is found in 31 U.S.C. 869, which provides in part as follows:

> "(a) No corporation shall be created, organized, or acquired on or after December 6, 1945, by any officer or agency of the federal government or by any government corporation for the purpose of acting as an *agency or instrumentality* of the United States, except by act of Congress or pursuant to an act of Congress, specifically authorizing such action.
>
> (b) No wholly owned government corporation created by or under the laws of any state, territory, or possession of the United States, or any political subdivision thereof, or under the laws of the District of Columbia, shall continue after June 13, 1948, as an *agency or instrumentality* of the United States, and no funds of, or obtained from, the United States or *any agency thereof, including corporations*, shall be invested in or employed . . .". (Emphasis added.)

XII.

Real Property Foreclosure—Application of State Law.

There is no separate or distinct federal law relating to foreclosure actions. Appellee is not in the position of choosing which State Law it wishes to be bound by and which it chooses to ignore.

Article VI, Section 5 of the Constitution of the State of California requires that the within cause be brought in the Superior Court of the State of California in the

County of Orange. (Discussed in detail in App. Op. Br. pp. 11-14.)

In "*Government Proprietary Corporations In The English-Speaking Countries*" (1937), by John Thurston, Department of Political Science, Published under the Direction of the Department of Government in Harvard University (*hereinafter sometimes referred to as GPC*), the word "proprietary" is used to designate corporations engaged in commercial or businesss enterprises as distinguished from purely Governmental corporations not engaged in business. (At p. 11.) This distinction is mentioned because the use of the word "proprietary" in the aforementioned book is not the same use as referred to in 28 U.S.C. 451.

Appellee corporation is in the same standing as any other commercial corporation would be in this cause.

The Appellee corporation in this case is strictly commercial in character.

> "To determine whether an enterprise is governmental or commercial, we should look to the method by which it is financed. If the activity is supported by taxation, that is prima facie evidence that it is governmental in character. If, however, the enterprise is self-supporting and derives its revenue from money received through the sale of its products or services, it is prima facie commercial. A common feature of private commercial concerns is that they finance themselves through the sale of their product; most of the traditional governmental activities, on the other hand, are supported by taxation, being activities from which the community as a whole, rather than certain customers, derives benefit and for which it is difficult to de-

> termine the share of cost which particular persons should pay, or which, for reasons of public policy, it is thought should be subsidized through levies upon those able to pay. But where the cost for a good or service can be determined and particular persons are the purchasers, the cost of production, including taxation equal to the fair share of the enterprise in the expense of governmental functions, should be charged to the purchaser." (GPC, cited *supra,* p. 74.)
>
> "We have already seen that for purposes of suit a government proprietary corporation is considered a separate legal entity, so that a suit against it is not a suit against the Government." (Government Proprietary Corporation in the English-Speaking Countries, cited *supra,* p. 86.)

Government corporations such as Appellee herein, engaged in commercial enterprises, may not claim the priority in bankruptcy proceedings to which the United States is entitled.

> "The Reconstruction Finance Corporation act creates a corporation and vests it with designated powers. Its entire stock is subscribed by the Government, but it is nonethelsss a corporation, limited by its charter, and by the general law. The act does not give it greater rights as to the enforcement of its outstanding credits than are enjoyed by other persons or corporations in the event of proceedings under the Bankruptcy Act." (*Continental Illinois N.B. & T. v. C.R.I. and P. Railway Co.*, 294 U.S. 648, 684 (1935)).

It is the policy of Congress in creating corporations which will be engaged in commercial enterprises to put them on the same footing and on a competitive status with other business type corporations.

". . . It would seem to be a generally sound legal principal to hold that such national proprietary corporations are subject to all the laws of the state in which they are operating, *except insofar as the state laws conflict with the functions assigned by the United States to such an extent as to impair the ability of the corporations to perform these functions,* and except insofar as Congress has by its enactments overriden state legislation. The paramount authority of Congress to control its national corporations must be admitted, and generally it would seem desirable for Congress to prescribe as far as possible the rules governing its corporations rather than to leave the matters to their varying laws of the 48 states. *But where Congress has not acted, the state laws should generally be held to apply,* and in view of the commercial nature of the corporations and their separate legal personality, the plea that they are instrumentalities of the national Government ought not to be too readily listened to. *Indeed, in commercial enterprises of this sort, so many questions arise on which the laws of the United States are silent and the laws of the states alone provide a guide that it is hardly practicable to refuse to recognize state legislation.*" (*Government Proprietary Corporations in the English-Speaking Countries*, cited *supra*, pp. 96-97 (Emphasis added.)

In *Shooters Island Shipyard Company v. Standard Ship Building Corporation,* 293 Fed. 706 (C.C.A. 1923), the situation involved priority of mortgages and turned on the question of whether a New Jersey law governing the execution and recording of Chattel Mortgages applied. The Court there stated that the instrumentality "does not stand in the place of the Government so as to share the immunities of the sovereign, but in its transactions as a distinct entity, it was bound to observe the law of the state in which it was doing business.

In the case of *Gielow v. Eastern Shore Ship Building Corporation,* 265 Fed. 845 (D.C. 1919), a similar situation was involved. By the terms of its contract with a firm later bankrupt, the Emergency Fleet Corporation would have gained title to certain materials, whereas by a law of Maryland, title would not be in the Fleet Corporation because the contract had not been recorded as required by state law. The Court held that, while Congress might provide that the provisions of a contract made by the Emergency Fleet Corporation should override a state law, *in the absence of such a provision* the Maryland law prevailed. Similarly, a motion to set aside the service of a summons upon the Emergency Fleet Corporation was granted on the ground that the requirements of a Florida statute had not been complied with. (*Hutchinson v. U.S.S. B. Emergency Fleet Corporation,* 13 F. 2d 954 (D.C. 1926).

As a conclusion, the author of "*Government Proprietary Corporations in the English-Speaking Countries,*" cited *supra,* states at page 103;

> "We may conclude with a paradox: In the law of Government proprietary corporations, the public interest is best served by regarding them as private."
>
> "It is desirable, in order that the corporation may be held entirely responsible and that judgments against it may be promptly executed, that the ownership of the property should be vested in the corporation. *Here, as in other respects, the corporation should be treated as if it were a private corporation and given no unfair advantages.*
>
> *Federal Land Bank vs. Priddy,* 295 U.S. 229 (1935), held that a federal land bank is subject to attachment of its property pursuant to state law, in connection with a claim against the bank. Federal land banks are instrumentalities of the Federal Government, and the question of whether they are subject to attachment is dependent upon the intention of Congress. The act creating the banks, since it gave them power to sue and be sued as fully as natural persons shows that Congress intended they should be subject to attachment. Moreover, it does not appear that the attachment would interfere with any judicial function performed by the banks or federal instrumentalities." (G.P.C., cited *supra,* p. 55; emphasis added.)

With relation to Appellee herein, it is obvious that none of its assets are assets of the United States. In the case of *Curran v. Arkansas,* 15 How. 304 (U.S.

1853), the state had taken over for its own use the prop erty and capital fund of the State Bank of Arkansas upon the bank becoming insolvent. The State had held all the stock in the bank. The plaintiff held bills of the bank and brought suit to recover and his recovery was upheld. The Court held that his right followed the assets of the bank and since the Supreme Court of Arkansas had decided that the State could be sued, the right could be enforced. Upon the banks becoming insolvent, its capital belonged to the creditors and not to the state; for the state to seize the capital was an impairment of the obligation of contract. See also *United States Sugar Equalization Board, Inc. v. P. De Rond & Co., Inc.,* 7 F. 2d 981 (C.C.A. 1925), where it was held that the Board could be enjoined from winding up its affairs and paying its funds over to the United States until it had paid a valid claim against it.

Appellee correctly states the law in quoting from *Chicago and N.W. Railway Co. v. Whitton* (1871), 80 U.S. 27, 286, as follows:

> "In all cases, **where a general right is thus conferred,** it can be enforced in any Federal court within the State having jurisdiction of the parties. . . ." (Emphasis added; App. Br. p. 28.)

But, such citation "begs the question" now before the court and assumes the very fact in issue.

Nowhere is there a *general right* conferred upon Appellee; *nowhere* is there a federal law contrary to, overriding or inconsistent with, Article VI, Section 5 of the Constitution of the State of California; *nowhere* is it shown that the application of the State Constitution or statutory law would impair the functions of Appellee;

nowhere has it been shown that Congress by its enactments has overridden state legislation.

Wherefore, it is respectfully prayed of the Honorable Court that the order made by the District Court on January 14, 1966, denying the motion of defendants and appellants to dismiss for lack of jurisdiction be reversed and that this cause be dismissed as to Appellants Kenneth G. Walker and Nancy M. Walker.

Respectfully submitted,

BAUM & ARAN,

By LEONARD P. BAUM,

Attorneys for Defendants and Appellants Kenneth G. Walker and Nancy M. Walker.

Certificate of Counsel.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals of the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

LEONARD P. BAUM